84-1467 (2)

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CLERK

CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT PALMER and FRANCES PALMER

PETITIONERS,

vs.

ILBERT TUCKER and MARGARET TUCKER

RESPONDENTS,

AND OTHER PARTY RESPONDENTS

NAMED HEREIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI WITH MANDAMUS ACTIONS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re

ILBERT TUCKER AND MARGARET TUCKER,
Bankrupts.

ROBERT PALMER AND FRANCES PALMER,

Petitioners-Appellants,

VS.

SEYMOUR J. ABRAHAMS,

Respondent, Nos.-83-2554/5

ILBERT TUCKER AND MARGARET TUCKER,

Respondents-Appellees,

PHILIP BOEBEL AND RIEN BOEBEL,

Parties in Interest.

ORDER

Before: FARRIS, ALARCON, AND NORRIS,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b0.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT PALMER AND FRANCES PALMER,

Petitioners-Appellants

VS.

SEYMOUR J. ABRAHAMS, ILBERT TUCKER AND MARGARET TUCKER,

Respondents, ORDER

PHILIP BOEBEL AND RIEN BOEBEL,

Parties in Interest-Appellees.

No. 84-1920

Before: FARRIS, ALARCON, AND NORRIS,

Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

In Re
ILBERT TUCKER AND MARGARET TUCKER,
Bankrupts.

ROBERT PALMER AND FRANCES PALMER,
Petitioners-Appellants,
V.
Seymour J. Abrahams,
Respondent,
ILBERT TUCKER AND MARGARET TUCKER,
Respondents-Appellees,
PHILIP BOEBEL AND RIEN BOEBEL,
Parties in Interest.

D.C. # 83-0745/6 MHP
No. 84-2554/5

Appeal from the United States District Court for the Northern District of California. Honorable Marilyn Patel, U. S. District Judge, Presiding.

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the Rules of this Court for

disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21 (c).

Argued and Submitted October 2, 1984 Before: FARRIS, ALARCON, AND NORRIS, Circuit Judges.

We affirm the Judgment below. The only order appealed from here is the district court's order of October 5, 1983, which affirmed two orders of the bankruptcy court issued November 29, 1982. Robert and Francis Palmer raise a variety of challenges to the order, but none of these challenges is meritorious.

The Palmers contend that it was error for the district court to deny a writ of mandamus ordering the bankruptcy judge to recuse himself for bias.

A writ of mandamus will issue only under extraordinary circumstances. The Palmers have failed to meet their burden of proving that such circumstances exist. They point to no evidence in the record, other than their bare unsubstantiated allegations, that bias existed. In addition, an extraordinary writ to disqualify a judge for bias will usually issue only when a party has submitted an affidavit showing bias before a judgment is entered. SEE GLADSTEIN V. McLAUGHLIN, 230 F. 2d 762 (9th Cir. 1955). Here the Palmers did not challenge Judge Abrahams until after he ruled unfavorably to them.

The Palmers also contend that Judge Abrahams' conduct deprived him of judicial immunity and ask in this court for the first time for a finding of civil liability and an award of damages.

This is also new on appeal. If the Palmers wish to pursue this claim, they must file a new action against Judge Abrahams.

The Palmers also contend that the provisions of the former bankruptcy code that allowed the bankruptcy judge to appoint a trustee for the bankrupt were unconstitutional. They cite no authority for this novel proposition. Moreover, the district court rejected this claim on the ground that the record does not establish that this contention was raised before the bankruptcy court. Although the Palmers claim that the issue was raised, there is nothing in the record to support that claim. It is well settled that parties cannot add matters to the record that were not raised in the proceedings below. SEE UNITED STATES V. WALKER, 601 F.2d 1051, 1054-55 (9th Cir. 1979).

The Palmers also seek relief from

the district court's order affirming the November 29, 1982 decision of the bankruptcy court not to allow the Palmers to amend their complaint to attack the November 1977 order of the bankruptcy court confirming the sale of the Via Contenta property to the Boebels. The bankruptcy court determined that the claim ofextrinsic fraud, which the Palmers sought to add in the amended complaint, had already been fully adjudicated and decided adversely to the Palmers in an opinion issued by the bankruptcy court of February 21, 1982. That opinion denied the claim of extrinsic fraud on the ground that it was time barred under Federal Rule of Civil Procedure 60 (a) and Bankruptcy Rule 924. The Palmers do not deny that their extrinsic fraud claim was denied in an earlier proceeding because it was time barred; indeed they acknowledge that their former attorney

advised them that they had lost the claim because it was made too late. (Appellants' Brief ¶ 64 at 22). Even though the Palmers might once have had a valid claim that the Via Contenta property transaction should be voided on grounds of extrinsic fraud, they are not entitled to continue to raise that claim again and again once it has been lost because the time allowed in which to challenge the decision had run.

The Palmers further contend that a constructive trust should be imposed on the Via Contenta property. This claim fails because it is based on the extrinsic fraud claim that was time barred.

Finally, the Palmers also ask for a reversal and remand for retrial on the issue of the value of the Carmel Valley Road Property. The fair market value of the property is a factual determination that is not clearly erroneous based on the record. Judge Abrahams relied on

testimony of appraisers in making his determination. The Palmers' theory that the value of the property was zero because it was unmarketable as encumbered is devoid of merit. The bankruptcy court made allowances for the costs of making the title marketable. These determinations were not clearly erroneous.

Appellees, the Tuckers, ask for attorneys fees in the amount of $3,035.00 representing 22.5 hours for the cost of defending the appeal. Palmer admits that he continues to pursue his claims even though they have been denied on multiple occasions by both the bankruptcy court and district court. He now challenges the actions of those courts by making unsubstantiated charges that both state and federal judges have joined with his attorneys and those of his opposition to defraud him. The district court earlier warned Mr. Palmer:

"I conclude that there is no merit

> to the arguments that you've raised on appeal, and I am going to give you a word of caution; this litigation has been going on for a long time. I am going to be merciful at this point and assume that you have not been acting out of any bad faith in pursuing this, and I am not going to order that attorney fees and costs be paid, but I am going to warn you now so it will appear as a mstter of record that if you continue to attempt to litigate this by renewing claims that have already been put to rest before the Bankrupcy Court or before this Court, then costs and attorney fees will be assessed."

Reporter' s Transcript, U.S. District Court, September 26,1983, p. 7.

Under these circumstances, we invoke our inherent power to "assess attorneys fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . ."Alveska Pipeline Service V. Wilderness Society, 421 U.S. 240, 258-59 (1975). The amount of fees will be fixed upon submission.

AFFIRMED.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

ROBERT PALMER AND FRANCES PALMER,

Petitioners-Appellants

V.

SEYMOUR J. ABRAHAMS, ILBERT TUCKER and MARGARET TUCKER,

Respondents,

D. C. No. C83-0745 MHP
No. 84-1920

RHILIP BOEBEL and RIEN BOEBEL,

Parties in Interest-Appellees.

Appeal from the United States District Court for the Northern District of California Honorable Marilyn Patel, U.S. District Judge, Presiding.

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21 (c).

Argued and Submitted October 2, 1984

Before: FARRIS, ALARCON, AND NORRIS,

Circuit Judges.

We affirm ghe judgment below because the district court did not abuse its discretion by expunging the two lis pendens in question or by affirming the bankruptcy court's award of attorneys fees. The only order appealed from in this matter is the district court's amended order expunging lis pendens and awarding attorneys fees and costs dated April 20, 1984. The plaintiffs/appelants, Robert and Frances Palmer, attack this order on a variety of grounds, but none of their claims is meritorious.

First, the Palmers ask relief from the Bankruptcy Court's order of November 23, 1977. We cannot deal with that order on this appeal. On this appeal, we are only dealing with the district court's order of April 20, 1984. That district court order did not review the bankruptcy court's Noverber 23, 1977

order, which was challenged in another appeal, In re Tucker, Nos. 83-2554/5. In our memorandum decision in that case, we explain the reasons we reject the Palmers' challenge to the November 23, 1977 order.

Second, the Palmers ask us to impose a constructive trust on the Via Contenta property. Again this matter is not properly raised in this appeal. The district court did not deny the request for a constructive trust in its April 20, 1984 order. We have no jurisdiction to impose a constructive trust in the absence of an appeal from a final judgment denying this relief.

Third, the Palmers seek a writ of mandamus to compel District Judge Patel to disqualify herself for bias. Although the Palmers assert that Judge Patel was "in league with (their) adversaries," they provide no evidence for their charges. Conjecture and supposition is

not such evidence. The fact that Judge Patel ruled against the Palmers is not such evidence. We will not issue the extraordinary writ of mandamus based on the uncorroborated assertions of the Palmers that Judge Patel was biased against them.

Fourth, the Palmers ask relief from the district courts' order expunging the two lis pendens. The district court had the authority to expunge the lis pendens under California law. 1/ See California Code of Civil Procedure ¶409.1; United Professional Planning, Inc. V. Superior Court, 9 Cal. App. 3d, 377, 385 (1970). Calfornia law provides that an order expunging a lis Pendens is not appealable and can only be challenged by writ of mandate. See California Code of Civil Procedure ¶ 409.4. The standard for review is abuse of discretion. Tropasso V. Superior Court of the County of Orange, 73 Cal. App.

3d 561, 567-68 (1977).

The Palmers apparently had two theories for filing the lispendens. The first theory is that the lis pendens was filed to enforce the judgment obtained as a result of the East Carmel Valley Road property. This theory fails because that action does not affect title or right to possession of the property on which the lis pendens was filed. California Cose of Civil Procedure ¶ 409.1 limits the use of a lis pendens to actions on the property on which the lis pendens is filed. The second theory is that the lis pendens was filed pursuant to the Via Contenta trust deeds from Tucker to Palmer. This theory fails because the challenge to the sale of the Via Contenta property to Tucker was time barred, as we discussed in our disposition of the related case of In re Tucker, Nos. 83-2554/5.

Fifth, the Palmer ask from the district courts' award of attorneys fees. The California Code of Civil Procedure ¶409.3 authorizes the court to award attorneys fess to the prevailing party in a motion to expunge a lis pendens. The relevant standard for review is abuse of discretion. See Loring v City of Scottsdale, 721 F.2d 274, 276 (9th Cir. 1983). Given the circumstances of the case, these fee awards would appear to be within the legitimate discretion of the courts below. The fact that lower amounts have been awarded in other cases does not establish that the awards in this case were an abuse of discretion.

AFFIRMED.

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In Re

ILBERT TUCKER AND MARGARET TUCKER,

Bankrupts.

ROBERT PALMER AND FRANCES PALMER,
Plaintiff-Appellant-Petitioners,

Vs.

No. 84-1920

SEYMOUR J. ABRAHAMS,
Respondent,

ILBERT TUCKER AND MARGARET TUCKER,
Defendant-Appellee-Respondents.

PHILLIP BOEBEL AND RIEN BOEBEL,
Parties in Interest.

No. C-83-0745-MPH
C-83-0746-MPH
(Related Cases)

The instant motion is the outgrowth of unnecessarily complicated bankruptcy litigation between appellants, the Palmers, and defendant Tucker, bankrupt. The parties have agreed to submit the motion without oral argument. The court has considered all the papers on file herein and renders its decision as set

forth below.

By order dated November 23,1977, the Bankruptcy Court affirmed the sale of the bankrupt's property commonly known as 10- Via Contenta, Carmel Valley, California, to petitioner Boebel as part of a compromise of a claim by petitioner. The Bankruptcy Court twice denied respondent's motion to vacate the November 23, 1977 order on February 12, 1982, and November 29, 1982. This court affirmed all orders of the Bankruptcy Court by its order dated October 5, 1983.

During the course of this litigation, respondent filed two lis pendens against the Via Contenta property. Petitioner seeks to have both lis Pendens expunged pursuant to California Code of Civil Procedure ¶409.1. A lis pendens is properly expunged by the court before which the proceeding is pending. Cal. Civ. Proc. Code ¶409.1. "(D)uring appeal, either the trial court of the appellate court has the

power to expunge under the statute." United Professional Planning, Inc. V. Superior Court, 9 Cal. App. 3d 377, 385 (1970). Moreover, it is within the inherent powers of this court to act where the proceeding before it is absolutely devoid of merit.

California Code of Civil Procedure ¶409.1 provides that ... "the court ... shall ... order that the (lis pendens) be expunged, unless the party filing the notice shows to the satisfaction of the court, by a preponderance of the evidence that: (a) the action does affect title to or right of possession of the real property described in the (lis pendens) and (b) ... the party recording the notice has commenced or prosecuted the action for a proper purpose and in good faith."

Respondent misconstrues the nature of the present action as one concerning real property. Appellants' claims are brought in the context of a bankruptcy proceeding.

In their complaint filed in Bankruptcy Court plaintiffs sought to have a debt declared nondischargeable and prayed for damages based upon a claim of fraud. The property which was the subject of that complaint is not the same parcel of property against which the lis pendens was filed. The Bankruptcy Court ultimately awarded damages based upon computations relating solely to the other parcel of property, identified as the East Carmel Valley Road property. Appellants also sought to amend their complaint in the Bankruptcy Court to add a claim seeking to set aside 1977 order of that court on the ground of extrinsic fraud. That order related to Via Contenta property. The Bankruptcy Court denied the motion. Plaintiff appealed both orders and this court affirmed. Thus, there is no action before the Bankruptcy Court or this court that affects title to or the right to possession of the Via Contenta property.

Even were this court to accept a characterization of this action as one concerning real property, respondent has not established, nor could he, that this action is being litigated for a proper purpose and in good faith. Respondent must establish that this action was prosecuted in good faith both at trial and on appeal. Peery v. Superior Court, 29 Cal. 3d 837, 843 (1981). Respondent's opposition merely recites the factual details of the underlying action. All of those factual allegations, however, have been decided against respondent by both the Bankruptcy Court and this court. "The patent lack of merit of an appeal from a sound judgment is ...demonstrative of an appellant"s improper purpose. (T)o avoid expungement after judgment, the losing party must demonstrate that he will raise a substantial issue for review...." Peery, 29 Cal.3d at 844-5. Respondent has not presented a substantial issue for review.

Respondent seeks only to relitigate once again matters that have been fully adjudicated and decided adversely to respondent.

Having failed to establish that this action concerns title to or the right of possession to the Via Contenta property and that this action is prosecuted in good faith, the lis pendens should be expunged.

Pursuant to California Code of Civil Procedure ¶409.3, petitioner, as prevailing party to a motion to expunge, is entitled to reasonable attorneys' fees and costs. Petitioner has incurred legal fees in the amount of $75.00 per hour plus costs. The court takes judicial notice of the prevailing hourly rates of attorneys in the community and previous orders of this court awarding attorneys' fees, including the declarations and papers upon which the orders were based, and concludes that $75.00

per hour is a reasonable rate.[1/] The hours claimed by petitioner's attorney appear reasonable. Therefore, petitioner is entitled to receive $75.00 per hour for 45.3 hours or $3,397.50, as reasonable attorney's fees for the time expended to date in expunging the lis pendens, plus $200.70 in costs.

1/ The Equal Access to Justice Act, 28 U.S.C. ¶2412, which provides for awards of attorneys' fees to prevailing parties in civil actions brought against the United States, has designated $75.00 per hour to be a reasonable fee. Although that statute is not applicable here, it is instructive.

Accordingly, IT IS ORDERED

1) that the lis pendens recorded in the Office of the County Recorder of Monteresy County, City of Salinas, California, at reel 1618, page 0999, by respondent on March 17, 1983, be expenged;

2) that the lis pendens recorded in the Office of the County Recorder of Monterey County, City of Salinas, California, at reel 1704, page 179, by respondent on January 30, 1984, be expunged;

3) that respondent is hereby enjoined from filing any further lis pendens against the property commonly known as 10-D Via Contenta, Carmel Valley, California.

IT IS FURTHER ORDERED that resppndent pay to petitioner within sixty (60) days of the date of this order the reasonable attorneys' fees and costs in the amount of $3,598.20. DATED: APR. 20, 1984.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

ILBERT TUCKER and MARGARET TUCKER,
Bankrupts.

ROBERT PALMER and FRANCES PALMER,
Plaintiff-Appellant-Petitioners,

vs. No. C 83-0745/6 MHP

SEYMOUR J. ABRAHAMS,
Respondent,

ILBERT TCUKER and MARGARET TUCKER,
Defendant-Appellee-Respondents.

ORDER

In this action, plaintiff and appellant Palmer seeks to set aside Order of Bankruptcy Court issued November 29, 1982 and order of Bankruptcy Court issued December 22, 1982. Plaintiff further sseks a Writ of Mandamus disqualifying Bankruptcy Judge Seymour J. Abrahams from this case.

Plaintiff brings a number of issues before this court for consideration, some of which are related to the above-

mentioned orders and are properly raised and some of which are raised for the first time on appeal. Initially, these unrelated matters must be disposed of under the well-settled principle that parties cannot add matters to the record that were not raised in the proceedings below. United States B. Walker, 601 F. 2d 1051, 1054-55 (9th Cir. 1979). Plaintiff raises the issue of the constitutionality of Bankruptcy Code provisions allowing a Bankruptcy Judge to appoint a trustee and an appraiser in bankruptcy. There is nothing in the record to show that this issue was raised in the proceedings below, and thus it will not be considered by this court on appeal.

Plaintiff seeks a writ of mandamus disqualifying Judge Abrahams from the case on the grounds of bias. Although a Judge is under a duty to disqualify him or herself on the grounds of bias or personal interest, 28 U.S.C. ¶455, this

matter was not raised in the proceedings below and is not properly before this court. Furthermore, extraordinary writs to disqualify a Judge from a case are issued only in exceptional cases, usually when a party has submitted an affidavit showing bias before a judgment is entered. Gladstein v. McLaughlin, 230F.2d762 (9th Cir. 1955). Plaintiff's actions at this point, after a number of orders adverse to plaintiff's interests have been issued by Judge Abrahams in this litigation, is not timely.

Appellant objects to the Bankruptcy Court's Order of November 29, 1982 denying appellant's Motion to Amend its complaint in order to set aside an order of the Bankruptcy Court issued November, 1977 on the grounds of extrinsic fraud. The lower court's determination that this matter had already been fully adjudicated and decided adversely to appellant was correct. An earlier motion

to set aside the November, 1977 Order, brought in these same proceedings had been decided adversely to appellant in an Opinion by Judge Abrahams issued on February 21, 1982. Judge Abrahams found that appellant's motion, at that date was time barred under Federal Rule of Civil Procedure 60(a) and Bankruptcy Rule 924, in that it was not brought more than a year after the order hasbeen issued. This is a correct statement of the law and appellant's attempt to amend its complaint and reopen this matter was properly denied.

Appellant also contests the Order of December 22, 1982, setting damages on appellant's claim on a $56,000 note, secured by a deed of trust on property commonly known as Eest Carmel Valley Road. Appellant, who foreclosed on the property, contests the set-off of its damages by $104,000, the fair market value of the East Carmel Valley Road

property. Appellant claims the property is "unmarketable." The fair market value of the property was a factual determination, and is not clearly erroneous based on the record, which shows Judge Abrahams relied on the testimony of appraisers in making determination. Thus, the December 22, 1982 Order should stand.

Finally, appellant disputes that part of the December 22, 1982 Order awarding defendant and appellee its costs of appeal. The discretionary award of costs is authorized by Bankruptcy Rule 115(e) and Judge Abrahams did not abuse his discretion in awarding costs to appellee.

This court, having heard oral argument from both parties on September 26, 1983 and having reviewed the briefs and record of this case, makes the following orders:

IT IS ORDERED that the Order of the

Bankruptcy Court of November 29, 1982 and the Order of the Bankruptcy Court of December 22, 1982 be AFFIRMED in all respects.

IT IS FURTHER ORDERED that appellant's request for a Writ of Mandamus disqualifying the Honorable Seymour J. Abrahams from this case be DENIED.

Dated: OCT 5-1983

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

ILBERT TUCKER
MARGARET TUCKER
Bankrupts

ROBERT PALMER and FRANCES PALMER
Plaintiffs

Bankruptcy Nos.
576-1826-A
576-2747-A

vs.

ILBERT TUCKER and MARGARET TUCKER
Defendants.

JUDGEMENT AFTER REMAND

This matter having come on regularly, on November 5, 1982, forfurther trial and argument after remand from the United States District Court for the Northern District of California, plaintiff Robert Palmer appearing pro se and defendant Ilbert Tucker appearing through Dennis Powell, Attorney at Law, and the court having heard the argument and considered the evidence, and good cause appearing,

IT IS HEREBY ORDERED that plaintiffs recover judgment against defendant Ilbert

Tucker in the amount of $8,893.34, together with interest thereon at 7% per year from May 8, 1978. Plaintiffs are awarded their costs in Bankruptcy Court and defendant is awarded his costs on appeal.

Dated

December 22, 1982

SIGNED

SEYMOUR J. ABRAHAMS
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

ILBERT TUCKER
MARGARET TUCKER

Bankrupts

ROBERT PALMER AND
FRANCES PALMER
Plaintiffs

Bankruptcy No.
576-1826-A
576-2747-A

Vs.

ILBERT TUCKER AND
MARGARET TUCKER

Defendants

MEMORANDUM OPINION ON REMAND (INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The District Court's Modified Order for Remand provides:

> The Bankruptcy Court is directed to compute plaintiffs' damages, if any, by offsetting the fair market value of the property as of the date of foreclosure. In computing damages, plaintiffs are entitled to recover expenses incurred in paying off prior liens and any loss of interest as a result if a delay in payment of the note.
>
> The case is remanded to the bankruptcy judge for decision consistent with this holding.

BEST AVAILABLE COPY

Under this order, I am to decide two questions: (1) fair market value on the date of the foreclosure, May 8, 1978, and(2) the interest lost as a resulf of the delay in "payment" of plaintiff's note. Palmer seeks to add a third issue: the deductibility of mechanics lien claims.

A. Fair Market Value at Foreclosure.

I find that the fair market value of the subject property on May 8, 1978, the date of foreclosure, was $99,000. This is the difference between Appleton's appraisal of $104,000 (RT 340: 3-4) and the $5000 pro-rata share of the expense of clearing title to the tennis court (RT 366:17-18, 358:8-13).

Appleton was the most credible of the appraisers. Middleton claimed only a $3000-$5000 increase in value from 1978 to 1979, an extremely low increase for those times. Wyman was probably not appraising for "fair mardet value", and he spoke only in generalities as to his

appraisal methods and supplied no calculations.

Plaintiff argues that the property's problems or defects made it "unmarketable", so that it would have no "fair market value." This is not correct. All of the problems could be cured or removed upon the payment of appropriate sums of money. If we calculate the fair market value of the house in an ideal condition and then subtract the cost of curing the problems, the difference is the fair market value of the property, as is.

Because Appleton's $104,000 appraisal did not provide for curing the title problem regarding the tennis court (RT 355:15-356:20), I have deducted the cost of curing that defect.

Plaintiff urges that we must also deduct the cost of completing construction of the house. I believe Appleton took this factor into account, however. His testimony shows that he had followed

the course of construction (RT 336:6-11) and that he made "adjustments" to other sales to make them comparable (RT 339: k2-24).

B. The expenses incurred in paying off mechanics liens: In my original decesion, I found the cost of satisfying liens to be as follows:

1st Anloff	$31,977.33
2nd Scarlett	8,100.00
3d Reynolds	6,000.00
Total	46,077.33
Foreclosure Cost	860.00
Recording fees	9.00
Reconveyance fees	84.00
Total	$47,030.33

Palmer seeks to add to these figures the amounts a title insurer paid to satisfy mechanic's liens. Palmer produced no evidence on these payments at the trial, and they were not included in my findings as to expenses and lien payments. There was no appeal from these findings. Because these payments would be equally important to all of the theories of damages that were con-

sidered at the time of the original trial, the reversal does not give cause to reopen the evidence so they can be considered at this time.

C. The lost interest.

Plaintiff contracted for security to satisry his note on default. To the extent the property afforded Palmer that security, he cannot recover of the defendant. Because the terms of the note included interest, we must determine if the value of property was sufficient to satisfy the interest as well as the principal of the note. According to its terms, the note became due on May 8, 1976, but the foreclosure was two years later. Obviously, Palmer should not profit from any unreasonable delay, and interest can only be included to the extent the foreclosure was timely held.

Although the delay is very long, I find that it was reasonable. Delay for the first few months was justified

sidered at the time of the original trial, the reversal does not give cause to reopen the evidence so they can be considered at this time.

C. The lost interest.

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Although the delay is very long, I find that it was reasonable. Delay for the first few months was justified

because of a short mutual extension of the note. Next, delay was appropriate while Palmer attempted to grasp the complexity of his situation-holding a fourth deed of trust instead of the promised first. Then, in August 1976, the first bankruptcy petition was filed, which imposed an automatic stay.

Judge Schwarzer's statements at the oral argument indicate that I am to look to my experience with this case and with bankruptcy cases generally to see if the plaintiff's post-bankruptcy delay in foreclosing was unreasonable.

This was a case under the Bankruptcy Act and foreclosures were therefore stayed by Bankruptcy Rule 601. That rule provided a procedure for seeking relief from the automatic stay, but the procedure was rarely used. The issue in such matters was usually perceived to be whether or not the estate had equity in the subject property. If the trus-

tee was making some effort to realize equity from the particular parcel-as the trustee was doing here-secured creditors were generally unwilling to pay the cost of suing for relief from stay, which would ordinarily require expensive appraisal testimony. In the case at bar, there were additional reasons as to why one in Palmer's position would be reluctant to sue, namely, the title problems and Palmer's junior status to three other trust deeds, as well as the various mechanics liens. It is important to note that all of the senior lien holders also delayed seeking relief from the stay. Finally, the holder of the first deed of trust applied for an abandonment on September 7, 1977, and, later, the property was abandoned on October 26, 1977. Then Palmer had to negotiate with the senior encumbrancers, raise the funds to buy out their interests and, finally, wait approximately four months to satisfy

California foreclosure requirements.

Accordingly, the two year delay was reasonable under the then law and practice.

The note (Exhibit 1A) provided for 10% interest from March 6, 1976, two years and 63 days before the foreclosure. The interest is therefore $10,863.01.

My calculations are as follows:

Amount lent	$50,000.00
Interest	10,863.01
Payment on liens and foreclosure expense	47,030.33
	$107,893.34
Less: Fair market value at time of foreclosure	99,000.00
Balance dur	$ 8,893.34

This sum should bear interest at 7% from May 8, 1978. Plaintiffs are entitled to their costs of suit in the Bankruptcy Court. Defendants are entitled to their costs on the appeal.

The foregoing discussion includes my findings of fact and conclusion of law.

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In Re

ILBERT TUCKER
MARGARET TUCKER

Bankrupts

Bankruptcy
No.576-1826-A
576-2747-A
JOINT ADMINISTRATION

ROBERT PALMER AND
FRANCES PALMER

Plaintiffs

vs.

ILBERT TUCKER AND
MARGARET TUCKER

Defendants

ORDER DENYING MOTION FOR LEAVE TO AMEND OR SUPPLEMENT PLEADIN

This matter having come on regularly for hearing, plaintiff appearing pro se and defendants appearing by Dennis Powell, Esq. and good cause appearing,

The motion for leave to ament or supplement the pleadings is hereby denies for the reasons stated orally during the hearing, including-but not limited to: (1) the attack on the trustee's quitclaim to Boebel has already been raised by Palmer and decided adversely to him and (2) any causes of action a-

gain Tucker from fraud, breach of fiduciary obligations, and wilful and malicious injury are timed barred under former sections 17(c)(2), former 11 U.S.C. section 35(c)(2); the alleged wrongs and injury occurred years ago, even if the state court did not confirm the injury until October 20, 1981.

Dated: Nov. 29, 1982.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of

ILBERT TUCKER AND

MARGARET TUCKER

Bankrupts

No 576-2747-A
576-1626-A

(Consolidated by Court Order)

(Proposed)

ORDER DENYING MOTION FOR RELIEF FROM ORDER APPROVING COMPROMISE WITH NOTICE

The motion of Robert S. Palmer and Frances M. Palmer for relief from order approving compromise without notice came regularly for hearing before the undersigned Bankruptcy Judgeon July 21, 1978, and September 13, 1978. Moving parties appeared by and through James R. Hagen, Esq. and responding parties, J. M. Dungan, Trustee herein appeared by and through Hoffman, Kelly & Iznirian, by William Kelly; and Philip and Rien Boebel appeared through Carnazzo, Her=

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of

ILBERT TUCKER AND

MARGARET TUCKER

Bankruptcy No. 378-37413-A
378-1A3A-A

(Consolidated by Court Order)

(Proposed)

ORDER DENYING MOTION FOR RELIEF FROM ORDER APPROVING COMPROMISE WITH NOTICE

The motion of Robert B. Palmer and Frances M. Palmer for relief from order approving compromise without notice came regularly for hearing before the undersigned Bankruptcy Judge on July 21, 1978, and September 13, 1978. Moving parties appeared by and through James E. Hagen, Esq. and responding parties, A. M. Dungan, Trustee herein appeared by and through Hoffman, Kelly & Zanolian, by William Kelly and Philip and Ryan Boebel appeared through Carmazzo, Hoe

Herendeen & Bryan, their attorneys, by Robert P. Herendeen.

This court having considered the moving papers, memoranda and declarations filed herein and oral testimony, stipulations and the arguments of counsel, the Court being duly advised in the premises, and good cause appearing, it is hereby

ORDERED that the motion for relief from order approving compromise without notice filed herein by Robert S. Palmer and Frances M. Palmer be, and the same hereby is denied and dismissed. Each party is to bear its own costs.

Dated: Nov. 6. 1978.

SEYMOUR J. ABRAHAMS
Bankruptcy Judge

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Attorneys for Trustee

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of

ILBERT TUCKER AND
MARGARET TUCKER

Bankrupts.

Nos. 576-1826-A
576-2747-A

AMENDED ORDER AUTHORIZING TRUSTEE TO COMPROMISE CONTROVERSY (BOEBEL)

J. M. Dungan, trustee of the estate of the above named bankrupts, having filed herein his APPLICATION FOR ORDER AUTHORIZING TRUSTEE TO COMPROMISE CONTROVERSY (BOEBEL) on September 15, 1977 and said application having come on regularly for hearing on due and proper notice to creditors on October 14, 1977, WILLIAM KELLY appearing for the trustee, and no one appearing in opposition to said application, and the Court being

fully advised in the premises, no adverse interest appearing, and this being a proper case for the making of the order following, and this Court having entered an order approving said compromise on October 26, 1977, and it later appearing that the real property description attached to said order and attached to the application originally filed in this matter was erroneous and that the real property involved in the compromise is described in Exhibit "A" hereto.

IT IS HEREBY ORDERED that J. M. Dungan, trustee herein be, and he is hereby, authorized to compromise the controversy between the estate herein and PHILIP BOEBEL and RIEN BOEBEL relative to the matters described in said application upon payment to the estate of the sum of $1,200.00 by PHILIP BOEBEL and RIEN BOEBEL and by execution by the trustee of a quit-

claim deed to the real property described in Exhibit "A" hereto and that said trustee be, and he is hereby, authorized to execute any documents necessary and proper to carry out the provisions of said compromise.

DATED this 23rd day of November, 1977,

JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

FILED
6/21/84

In re Charge of	)	No. 84-8023
	)	
Judicial Misconduct	)	ORDER

Before: BROWNING, Chief Judge

A complaint alleging misconduct has been filed against a bankruptcy judge in this circuit pursuant to the Ninth Circuit Procedures for Processing Compliants of Judicial Misconduct, 28 U.S.C., 9th Cir., R. App. II, issued under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Pub. L. No. 96-458, 94 Stat. 2035 (1980). The complainant was a creditor in a bankruptcy case handled by the judge who is the subject of the complaint.

The overall charge against the judge is that he was part of a conspiracy in which he "was the principal character directing and controlling a fraudulent bankruptcy by which the bankrupt was able

to make millions of dollars." The bankruptcy was filed on August 6, 1976. Two years before that, the complainant claims to have been told by the bankrupt that the latter had "planned his bankruptcy, with his attorney, through the bankruptcy court." The complainant further alleges that the judge appointed a trustee, counsel for the trustee and an appraiser to help carry out the fraudulent bankruptcy with other co-conspirators. The judge continued until at least August 1982 to hear and decide matters which the complainant considers to reflect the judge's involvement in the alleged conspiracy.

The complaint itself consists of a detailed description of the complainant's efforts to recoup through the bankruptcy court and the state courts some part of the loans he had made to the bankrupt. In the course of these efforts, the complainant employed several different at-

torneys whom he feels compromised his rights. The complainant also feels that the trustee, the trustee's counsel, the appraiser and others conspired with the court to perpretrate a fraudulent bankruptcy. Finally, the complainant contends that a state court judge forced him to accept an unconscionable settlement of some of his claims.

The complainant's case against the bankruptcy judge rests upon the existence of a "prior private agreement" as a result of which the judge purportedly made or withheld rulings in order to benefit the bankrupt. The complainant assumes the existence of this prior agreement from the claimed admission by the bankrupt that he and his attorney planned the bankruptcy "through the bankruptcy court." Other than this one ambiguous remark, the complainant relies solely on the judge's rulings as evidence of the

judge's involvement in the alleged conspiracy to carry out a fraudulent bankruptcy. The complainant reviews numerous of the judge's rulings and failures to rule in an attempt to show the judge strained to rule in favor of the bankrupt or withheld rulings when doing so would benefit the bankrupt.

A close examination of the complaint reveals that the charges against the bankruptcy judge are essentially objections to procedural or substantive rulings the judge made or failed to make. Each ruling or failure to rule cited by the complainant was subject to review by a higher court. Appellate review is the proper remedy for the kind of error in procedural and substantive rulings alleged in the complaint. The Procedures for Processing Complaints of Judicial Misconduct are designed to handle allegations of misconduct for which no judicial reme-

Judge's involvement in the alleged conspiracy to carry out a fraudulent bankruptcy. The complainant reviews numerous of the Judge's rulings and failures to rule in an attempt to show the Judge obtained to rule in favor of the bankrupt or withheld rulings when doing so would benefit the bankrupt.

A close examination of the complaint reveals that the charges against the bankruptcy Judge are essentially objections to procedural or substantive rulings the Judge made or failed to make. Each ruling or failure to rule cited by the complainant was subject to review by a higher court. Appellate review is the proper remedy for the kind of error it procedural and substantive rulings alleged in the complaint. The Procedures for Processing Complaints of Judicial Misconduct are designed to handle allegations of misconduct for which no judicial rem-

dy exists. Because appellate review was available, the complainant's charges must be dismissed as inappropriate for consideration under the Procedures. Procedures ¶3(A)(ii); In re Charge of Judicial Misconduct, 613 F.2d 768, 769 (9th Cir. 1980).

The complainant, of course, alleges that the judge's rulings and failure to rule constitute evidence of his participation in a conspiracy to carry out a fraudulent bankruptcy. The errors alleged by the complainant, however, are no different from those that might be cited in any similar bankruptcy proceeding. Their nature and extent are not such as to justify an inference of judicial misconduct. In re Charge of Judicial Misconduct, 685 F.2d 1226 (9th Cir. 1982).

Nor can an inference of judicial misconduct be based on the alleged admission by the bankrupt of the judge's participa-

tion in a conspiracy. The bankrupt's remark that his bankruptcy was planned "through the bankruptcy court" is not probative of an improper involvement by the judge in a fraudulent bankruptcy. The only other evidence cited by the complainant are the judge's rulings which, for the reasons noted above, are an insufficient basis for an inference of judicial misconduct.

Finally, the Procedures for Processing Complaints of Judicial Misconduct apply to four specifically enumerated categories of federal judicial officers. Bankruptcy judges comprise one such category. The other individuals against whom the complainant articulates grievances--attorneys, a state court judge, the trustee the appraiser and others--are beyaond the jurisdiction of the Procedures. Procedures, ¶1.

The complaint is dismissed.

Signed by Chief Judge